

**IN THE HIGH COURT OF NEW ZEALAND
Rotorua Registry**

**CRI-2012-070-4753
[2014] NZHC 2577**

THE QUEEN

v

KARL RODNEY GOLDSBURY

Hearing: 15 October 2014

Appearances: H A Wrigley for Crown
P G Mabey QC for Prisoner

Sentence: 15 October 2014

SENTENCE OF KEANE J

Solicitors:
Crown Solicitor, Tauranga

[1] Karl Goldsbury you appear for sentence for five offences after trial. The jury found you not guilty of four other offences.

[2] First, you are for sentence for an offence on 19 September 2012 at Pokeno. You then supplied some Asian males from Auckland with one litre of hypophosphorous acid, which is capable of being used to manufacture methamphetamine. You knew that was the purpose for which it was to be used.

[3] Your second offence was on 7 October 2012 at Tauranga. You then supplied methamphetamine to John Poi and Desmond Jury, who are members of the Gisborne chapter of the Mongrel Mob. You were then, and may be still, a member of the Maketu chapter. The quantity you supplied them was 8.6 grams of methamphetamine. That was established when they were arrested on the same day on their way back to Gisborne.

[4] Your third offence was on 3 December 2012. You were stopped at Ruahihi, travelling back from Hamilton to Tauranga. You then possessed 1.3 kilograms of iodine, which is also used in the manufacture of methamphetamine, and that is why you had it. It was worth between \$1,000 - \$4,000.

[5] Your fourth, and primary, offence was between 7 – 9 December 2012. You conspired with Ryan Carroll, an associate of yours, and also with his employee, Terrence Jones, and in turn with his then partner, Tracey Farrow, to manufacture methamphetamine at 56 Park Road, Katikati. Mr Jones and Ms Farrow were the tenants of that address. Whether you manufactured, and the scale on which you did so, are the primary issues I have to resolve in sentencing you.

[6] Your fifth offence was at the Katikati address on 9 December, when the Armed Offenders' Squad made its presence plain. You then wilfully attempted to defeat the course of justice by destroying equipment and materials for manufacture, assisted by Mr Jones. You were also charged with setting fire to the building but the jury acquitted you of arson. That did, however, coincide with the destruction of the equipment and that raises an issue in itself.

[7] In sentencing you for your lead offence, the conspiracy, I take into account all of your others, not just the fifth. The iodine you possessed on 3 December 2012, I am satisfied, was for the purpose of the manufacture to take place four days later. Your two earlier offences, though more distant in time, demonstrate that you had access to, and were dealing in, precursor substances or materials for manufacture as well as methamphetamine itself.

Sentencing purposes and principles

[8] In sentencing you I must hold you accountable for the harm you have done, promote in you a sense of responsibility, denounce your conduct, deter you and others from acting in this way, protect the community and provide for the interests of any conceivable victim. This is, I hope you are beginning to understand, far from victimless offending. I must also, to the extent that I can, assist you in your rehabilitation and reintegration.

[9] I must have regard to the following sentencing principles: the gravity of your offending, the need to be consistent in sentence with other cases, the need to impose a sentence near the maximum, should that be warranted. Equally, I must take into account of the contrasting principles: the need to adopt the least restrictive outcome appropriate; the need to take account of anything that would make an otherwise proper sentence disproportionate; and the need to recognise you in the context of your family and community.

[10] Where drug offending is as significant as yours, however, I have to say, personal circumstances and the more positive purposes and principles of sentencing normally have little part to play. Denunciation and deterrence are what is principally called for.

[11] It follows that the very many letters that I have received from your family confirming that, within your family, you are hard working and generous, especially to the elderly, cannot affect the sentence I must impose on you. As your careful pre-sentence report says, you will be at high risk of re-offending as long as you continue to use drugs and associate with those who manufacture and trade, particularly if you

remain affiliated to a gang. Those are issues you will have to address during your sentence.

Conspiracy issues

[12] The sentence I must impose on you for your lead offence, the conspiracy, turns on three issues, the most immediate of which is your part in that conspiracy. That is also the simplest. The evidence is that you instigated and controlled the conspiracy and I do not understand you to contend otherwise. That has an inevitable bearing on your sentence.¹

[13] The second issue is the extent to which you gave your agreement effect: the extent to which you obtained precursor substances, or other chemicals for manufacture, and the equipment called for, and then manufactured. Despite the fact that the maximum sentence for conspiracy is 14 years, and that for manufacture is life imprisonment, the closer you came to manufacture, the more closely you are to be sentenced as a manufacturer.² The third issue, if I find you did manufacture, is the scale on which you did so.

[14] The result is, depending on my findings of fact, that you are either to be sentenced for the conspiracy principally, according to the 14 year maximum, or more, according to the four band scale for manufacture in *R v Fatu*, discounted to recognise that you are to be sentenced for conspiracy, not manufacture, and depending on how far and to what extent your conspiracy was given effect.

[15] If I do find you manufactured, the issue will then be within which of two *Fatu* bands you are to be sentenced, subject to the discount for conspiracy: band two, which sets starting points of four – 11 years imprisonment for manufacturing up to 250 grams, or band three which sets starting points of 10 – 15 years imprisonment for manufacturing large commercial quantities in the range 250 – 500 grams. If you did manufacture, the discount then to apply is of the order of five – 10 per cent.³

¹ *R v Fatu* [2006] 2 NZLR 72 at [31].

² *R v Te Rure* [2008] 3 NZLR 627 at [25] – [27].

³ At [28].

[16] Finally, as to whether you did manufacture and on what scale, I need to make clear that while I am able to make those findings by inference, I must ultimately be satisfied to the criminal standard of proof.⁴ Also, I must focus on you and your offending, and only take into account safely analogous cases. *R v Newton*,⁵ on which the Crown relies, is in part similar and in part materially different.

Conspiracy submissions

[17] At trial the Crown contended that, when the Armed Offenders' Squad intervened at the Katikati address on 9 December 2012, you had almost completed manufacture. You had only to convert pseudoephedrine into methamphetamine, and your scale of manufacture was to be equated with what was found in the nearby fire pit afterwards, 1.095 kilograms of iodine and 600 millilitres of hypophosphorous acid.

[18] In this submission the Crown relies on the opinions of ESR analysts. One was that 600 millilitres of hypophosphorous acid could in optimal conditions yield 556 grams of methamphetamine. The other was that just over a kilogram of iodine could yield in excess of 800 grams of methamphetamine. Alternatively, the Crown contends, you might have completed manufacture and returned those items to the fire pit. Ironically, if 400 millilitres of hypophosphorous acid had been used, that would have yielded 370 grams.

[19] In either event, the Crown contends, your yield must have exceeded 250 grams and you lie in band three *R v Fatu*, which warrants starting points of 10 – 15 years imprisonment, and on a discounted basis 10 – 11 years. The Crown also supports that submission by saying that, even if you lie within band two, you are at the upper end.

[20] Your counsel contends that the Crown's assessment is speculative. Even if I can be satisfied that you were intent on manufacture when the AOS intervened, there is no evidence that you actually did manufacture.

⁴ Sentencing Act 2002, s 24(2)(c), *R v Fatu* at [38].

⁵ *R v Newton* [2013] NZHC 639.

[21] Your counsel contends that the Crown cannot equate hypophosphorous acid found, or the iodine, with the yields it contends for. The ESR estimates assumed optimal conditions and technique. They also assumed that you had enough pseudoephedrine and there is no evidence you did.

[22] Your counsel has cited to me a number of cases in which yield estimates derive from the pseudoephedrine found, not any other constituent; and that, he contends, has to be fatal to the Crown's calculation. The alternative Crown inference, that you had completed manufacture, he submits, is contrary to its case at trial.

Agreement given effect

[23] Against that background I return to the two issues about which I have to be satisfied and, as to the first, I am satisfied that you were intent on manufacturing to a significant commercial level at Katikati on 8 – 9 December 2012, that you engaged Mr Carroll and Mr Jones and Ms Farrow in that endeavour, and that you were manufacturing when the AOS intervened.

[24] First, I find, that was why you obtained 1.3 kilograms of iodine on 3 December 2012 and, after you were apprehended at Ruahihi and that iodine was taken from you, you obtained more from Hamilton on 7 December 2012. The iodine found in the fire pit after the fire, 1.095 kilograms, could well have been what you procured the second time.

[25] Secondly, I find that on 7 December 2012, after you returned from Hamilton at about 11 pm, you and Mr Carroll went to Katikati so you could check it out. Your text, in which you told him you were 10 minutes from his house, and the text Mr Jones sent him at 11.20 pm describing how he could get access and reassuring him it was safe to come, are all of a piece. So too is an earlier exchange between Mr Jones and Ms Farrow, and the text you sent your partner at 3.34 am on 8 December saying that you were working late that night.

[26] Thirdly, I find, you equipped yourself by buying hardware items at three outlets in Tauranga on 8 December 2012 capable of being used in manufacture: a PH

meter, Teflon tape, plastic funnels, disposable latex gloves, a drop sheet, flock lined gloves, several baking dishes, metal sieves, a chilly bin, a Magic Bullet, a form of granulator, and finally Pure Dew water.

[27] Fourthly, I find it no coincidence that when at 8.23 pm, you and Mr Carroll met at the Bethlehem shops, after you made those purchases, you did not transfer them from your partner's car to his wagon immediately. You transferred them, less conspicuously, in a semi rural area at Tanewha Place.

[28] Fifthly, I find that, when at 9.27 pm you and Mr Carroll arrived at Park Road, you ceased to use your mobile phone, because you were intent on manufacture. Earlier that day, when texting a woman you had agreed to pick up from the airport at some later date, you told her that you were going to be inaccessible because you were going down the coast. That was plainly untrue.

[29] Sixthly, at 10.50 pm, I find also, it is no coincidence that Mr Jones and Ms Farrow went to the BP Service Station and got eight bags of ice, which on the ESR evidence, enables condensation essential to manufacture. The bags were found afterwards in a burnt out freezer, close to where manufacture must have taken place.

[30] Seventhly, it is also no coincidence, I find, that at 11.34 pm Mr Jones and Ms Farrow left a second time and, while they came back at 1.52 pm, they left again at 2.38 am and spent the balance of the night at Mr Carroll's yard at Mt Maunganui where Mr Jones worked on Ms Farrow's car. They clearly left to enable you to begin manufacture, assisted by Mr Carroll.

[31] Eighthly, I find that when at 11.30 am on 9 December, the AOS made its presence plain, manufacture must have been well advanced. You and Mr Jones first attempted to escape through the back roller door, only to be checked by the AOS. Then, just by that door, there was considerable noise consistent with the equipment for manufacture being destroyed. After that the fire erupted and you, Mr Jones and Ms Farrow, did not leave the building, at the far end, until the very last moment. You were clearly intent on ensuring that no evidence remained.

[32] Ninthly, the search of the burnt out shell afterwards, I find, confirms that you were manufacturing close to the back roller door. At that point there were cookers, three condensers, three metal cylinders, all consistent with distillation, two fans and an item of glassware. The condensers and cylinders were not every day items. Their purpose had to be manufacture.

[33] Tenthly, obviously and most tellingly, discovered afterwards in a fire pit near to the destroyed building, carefully wrapped, were three items needed for the last phase of manufacture: the kilogram of iodine, three fifths of a bottle of hypophosphorous acid, and a parr bomb in which were traces of past manufacture.

[34] At trial the Crown case was that these items were consistent with manufacture not yet at the reaction stage. On sentence I am invited to infer, alternatively, that manufacture might have been complete and they had been returned to the fire pit. I do not accept that. That was not the Crown's case at trial. The larger issue remains on what scale you were manufacturing when interrupted.

Scale of manufacture

[35] As to scale, the Crown contends, primarily as I have said, that you were about to complete manufacture on a scale consistent with the amount of hypophosphorous acid and iodine in the fire pit. Your counsel contends that that cannot be assumed in the absence of any evidence of pseudoephedrine.

[36] I accept that the pseudoephedrine you would have had to have to manufacture on the scale that the Crown contends for is not in evidence. I accept also the significance pseudoephedrine is given in the numerous cases to which your counsel has referred. It is the fundamental constituent determining the scale of manufacture. I do not accept that the absence of evidence as to pseudoephedrine is fatal to the Crown's case.

[37] Everything that had happened before that date, everything that happened on that morning, the equipment itself and the presence of other chemicals necessary for manufacture, point to the fact that you must have had sufficient pseudoephedrine for

significant manufacture. Everything you had and did would be inexplicable otherwise.

[38] In *Te Rure*, moreover, the principal case on the relation between conspiracy and manufacture, just as in your case, the police intervened while manufacture must have been taking place, but the evidence there too was destroyed. All that was left, as the Court of Appeal said, were ‘traces of chemicals and other relevant materials in the toilet system, and some further evidence consistent with manufacture in an unknown quantity’.⁶

[39] Despite that, on a Solicitor General’s appeal, the Court found that the Crown had been generous in contending for a lower mid point *Fatu* band two manufacture. The Court characterised it as ‘potentially very serious offending’. In granting the appeal, however, the Court had to hold to the Crown’s generous starting point, which your counsel adopts in your case.⁷

[40] In your case the evidence as to manufacture and its scale is much more definite. The equipment and materials you had suggest that you must have been capable of manufacturing on a scale likely to yield at least 250 grams of methamphetamine, towards the top of band two. I cannot be satisfied to the criminal standard as to band three.

[41] I have also to be conservative in the starting point I take within band two, because you are charged with conspiracy, not manufacture. I take an eight year starting point.

Remaining issues

[42] Counsel have agreed the sentences your other offences warrant, standing alone, leaving aside the principle of totality, and I agree with their analysis.

[43] They agree that your first offence, the hypophosphorous acid supply, warrants a starting point in the range two – three years imprisonment; the methamphetamine

⁶ *R v Te Rure*, above n 2, at [3].

⁷ At [32].

supply to Mr Poi and Mr Jury a starting point in the range three – four years imprisonment; the possession of iodine offence a starting point of two years imprisonment. They differ as to the intent to defeat the course of justice offence. The Crown contends for a four year starting point, your counsel for three years.

[44] Counsel agree also that these figures must be adjusted in totality and again do not differ significantly as to by how much they must be adjusted. Nor do they differ as to the extent to which you may be entitled to a credit for having been on electronically monitored bail.

[45] They differ as to whether your primary offence, the conspiracy, should be adjusted upwards to take account of your correlated offending, or that offending should in the main be the subject of cumulative sentences. But, as your counsel said, what counts finally is your end sentence. They also differ as to whether you should be sentenced to a minimum period of imprisonment.

[46] There remain two other issues. One is reparation, which the Crown seeks as a result of the destruction of 56 Park Road and any loss to those who had property there. As to that, however, I have only the victim impact statements and I am told by your counsel, and accept, that you lack any means to meet reparation.

[47] The other issue arises on the Crown's application for an instrument forfeiture order relating to the car you were driving at the time of your first offence. As to that, however, Mr Carroll has lodged a recent claim, and I am not able to deal with that issue today. It will have to be resolved later.

Outcome

[48] For the conspiracy I take a starting point of eight years. I increase that by six months to take account of your previous related conviction in 2008 and uplift it by a further six months because you offended while on bail, increasing that sentence by one year. You also spent 17 months on EM bail, however, and for that I will allow you an offsetting 12 month discount, holding that sentence at eight years.

[49] For the supply of hypophosphorous acid, having regard to the principle of totality, I sentence you cumulatively to six months imprisonment. For the supply of methamphetamine, cumulatively, to 12 months imprisonment. For attempting to pervert the course of justice, cumulatively, to 12 months imprisonment. That brings your effective sentence to 10.5 years because I impose on you concurrently the sentence for possession of iodine, two years imprisonment.

[50] The issue whether I should also impose on you a minimum period of imprisonment turns on whether your sentence sufficiently holds you accountable for your offending, and sufficiently denounces and deters; and relevant to that is, I accept, the responsible way you have acted while on bail and remand.

[51] What concerns me ultimately, however, is that you offended seriously in 2008 and have now offended again more seriously and very persistently. I consider, therefore, that your finite sentence, by itself, would not serve the statutory purposes sufficiently and I impose a minimum period of imprisonment of five years.

P.J. Keane J